The question arises, therefore, whether there is any legal obligation on appellant to pay this sum of $6,062, if he receives the car. In *Davies* v. *Rees* the holder of the bill of sale counterclaimed for the amount of the loan with interest at 5%, the covenant providing for interest at 58%. He succeeded on his counterclaim, the court holding he was entitled to succeed as on a claim for money lent, although the covenant was no longer binding. That decision was unanimously confirmed by the Court of Appeal. As I have already held, the second agreement in the present case was to secure money actually lent and also the cash balance owing to complete the original purchase of the car. Following *Davies* v. *Rees*, notwithstanding the fact that the security is void and that no covenants contained in it may be enforceable, the sum of $6,062 remains owing by the appellant to the respondent partly as money lent and partly as the balance of the amount payable to complete the original purchase of the car. Although the respondent was precluded from claiming this amount on the pleadings in these proceedings because of the manner in which his claim was based, he might have included a claim in the alternative based on what has now been found to be the effect in law of the various transactions between the parties. Moreover, it would not be just to award to the appellant the full value of the car at the time of its seizure when he owed this amount in respect of it. I would therefore give judgment in favour of the appellant for the value of the car ($9,000) less this outstanding amount, i.e. to say for $2,938.

There remains the question of damages for detention of the car. The only evidence from which the amount of these damages might be estimated, was given by the appellant. He claimed that he received $10.50 for the daylight hiring of the car and $9.50 for the night hiring, a total of $20.00 for twenty-four hours. It was actually hired out when it was seized. In cross-examination, he said that the two people to whom he was hiring the car, one at night and one in the day, had been hiring the car daily ever since he first bought the car, except for odd days. He was responsible for tax ($674 for six months), tyres, insurance ($479 a year) and repairs which he said he did himself. The car would have to be off the road occasionally for repairs. On this evidence, a not unreasonable estimate of the gross rent might be $500 a month, based on the use of the car twenty-five days a month. From this over $150 a month must be deducted for tax and insurance. The plaintiff has produced no evidence about the cost of tyres and repairs. Tyres would presumably wear out quickly with this constant use, which would also involve high consumption of lubricating and similar oils when repairs were carried out. The appellant must also face high depreciation with such constant use. All in all, $200 a month seems reasonable damages to allow for detention of the car as representing the nett profit that might accrue to the appellant.

As to the period for which this should be allowed, the first judgment in these proceedings was delivered on 1st December, 1962. That judgment declared the respondent the owner and therefore, although it was set aside on appeal, from the date of that judgment it cannot be said that the respondent was unlawfully detaining the car. There should therefore be damages in respect of the period from the date of seizure (27th July, 1960) until 1st December, 1962, i.e. for a period of approximately twenty-eight months. I would therefore assess these damages on the available evidence at $5,600.

In the result, the appeal should be allowed, the judgment of the court below set aside, and the appellant should have judgment against the respondent for $8,538. He should also have an order for costs of this appeal and also of both trials in the court below. There is already an order in his favour in respect of the costs of the first appeal.

It was agreed by both counsel that the taxi-licence remained the property of the appellant. Pursuant to this judgment, the documents relating to the car, other than the taxi-licence, must be delivered by the appellant to the respondent and the appellant must sign a transfer of registration of the car in favour of the respondent or its nominee. The parties should have liberty to apply to the High Court should any difficulty arise in regard to these aspects.

Barakbah C.J. (Malaya): I agree.

Winslow J.: I had originally intended to make some observations on whether the Moneylenders Ordinance has application to any of the transactions herein and, if so, what different consequences (if any) should follow. However, since this has not been pleaded, I propose to refrain from doing so.

I have had the privilege of previously reading the judgment of the Chief Justice, Borneo, which he has just delivered and should like to say that I agree with it entirely.

Appeal allowed.

Solicitors: *A. J. Braga; Chung & Co.*

MUTHIAH v. LEE KOR FAN

[O.C.J. (MacIntyre J.) September 1, 1965]

[Ipoh — Civil Suit No. 380 of 1964]

Land Laws — Mining — Cancellation of sublease — Onus — Discretion of court — Mining Enactment (Cap. 147), ss. 16(iii)(b) and 97(ii)(c) — Sch. X cl. 8(iii).

Estoppel — Nature of representation.

The plaintiff filed a complaint in the court of the senior inspector of mines under section 97(ii)(c) for cancellation of sublease granted to the defendant on the ground that the defendant had committed a breach of clause 8(iii) of the sublease. The complaint was transferred to the High Court under section 100A of the Mining Enactment. On January 13, 1961, the plaintiff subleased Lot No. 42979 to the defendant who in turn on the same day sub-subleased the said land to W. who had also obtained another sub-sublease of an adjoining land (Lot 40993) on the same day. W. carried on mining on Lot No. 42979 up to August 1962. W. transferred sub-sublease over Lots 40993 and 42979 to L.F. and L.K. on June 16, 1963. On March 1, 1964 L.F. and L.K. granted a permit to mine to L.K. and H. to mine Lot No. 40993 and only 4½ acres of plaintiff's land (Lot 42979). The plaintiff's land had not been mined since August 1962. In March 1964 the permit holders submitted a mining scheme which was approved on April 10, 1964. The plaintiff had filed his complaint before the senior inspector of mines on March 14, 1964.

The defendant in his defence set up the plea of estoppel urging that the plaintiff had agreed to the approved mining scheme, had accepted a copy of the approved mining scheme and visited the land to observe the contruction of the *palong* and the *kongsi* house etc. and had represented to the permit holders and the defendant that he had no intention of taking action under clause 8(iii) of the sublease. The defendant in the alternative urged that the court should not in any event exercise its discretion in favour of the plaintiff.

Held: (1) the onus was on the plaintiff to show that there were reasons why the court should exercise its discretion in favour of the sub-lessee and that there were special reasons why the sublease should not be cancelled. There were in this case no grounds or special reasons why the sublease should not be cancelled; (a) the mere installation of a water pump on the plaintiff's land without any intention to mine the plaintiff's land constituted a violation of the letter and spirit of section 16(iii)(b) of the Mining Enactment; (b) the fact that the plaintiff's land by itself could not be worked as a single unit owing to inadequacy of dumping facilities and lack of water supply is no reason why the sublease should not be cancelled. The defendant should have considered these problems before he took the sublease and the fact that the land cannot be mined by itself is a sufficient reason for cancellation of the sublease; (c) the court should not exercise its discretion which would be tantamount to depriving a lawful owner of property of the right to use it to his best advantage; (d) whether the plaintiff is able to find a suitable dumping area or not is his own concern;

(2) one of the necessary elements of a valid estoppel by representation is that the representation should be of a nature to induce, and is made with the intention of inducing, the party raising the estoppel to alter his position to his detriment and in this case the plea of estoppel must fail.

Case referred to:—

(1) *Loke Yew Mines Ltd.* v. *Eu Keng Chee & Ors.* [1955] M.L.J. 189.

CIVIL SUIT.

N. Sharma for the plaintiff.

Chin Swee Onn for the defendant.

Cur. Adv. Vult.

MacIntyre J.: This is a claim by the plaintiff for an order of cancellation of sub-lease No. 8 of 1961 registered in the office of the Senior Inspector of Mines, Perak, in respect of a piece of mining land described in mining lease No. 14297 for lot 42979 (hereinafter referred to as lot 42979), of which the plaintiff is the registered lessee and the defendant the registered sub-lessee.

The cancellation of the sub-lease is sought on the ground that the defendant had committed a breach of clause 8(iii) of the sub-lease in that he failed to employ for not less than one month since the 14th of September 1962 or thereabouts at least 59 labourers or labour saving apparatus as prescribed in section 16(iii)(c) of the Mining Enactment, Cap. 147.

This action was commenced by a complaint dated the 14th of March 1964 lodged by the plaintiff in the office of the Senior Inspector of Mines, Perak, in accordance with the procedure prescribed in section 99 of the Mining Enactment, but was later transferred under the provisions of section 101 to the High Court for hearing.

The defence is a plea of estoppel based on an alleged representation made by the plaintiff to the defendant and later to the sub-lessees and to the present holders of a permit to mine on lot 42979, to the effect that he would not take action to cancel the sub-lease under clause 8(iii) thereto and to have thereby induced the permit holders to implement a mining scheme at an approximate cost of $100,000.

However, section 97(ii) of the Mining Enactment confers upon the Senior Inspector of Mines a discretionary power to cancel a sub-lease. In *Loke Yew Mines Ltd.* v. *En Keng Chee & Ors.*,[1] Wilson J. observed:

> "My reading of section 97 of the Mining Enactment is that if it has been proved that the sub-lessee has failed to observe the conditions referred to in paragraph (a), (b), (c) and (d) of sub-section (ii) of section 97, the lessees are entitled to an order of cancellation unless the sub-lessee shew that there are reasons why the Senior Inspector of Mines or the court should exercise discretion in favour of the sub-lessee".

I fully concur with this view. If therefore the defendant is able to shew cause, apart from estoppel, that there are special reasons why the court, in the exercise of its discretion, should not cancel the sub-lease the plaintiff's claim in the present action must fail.

Since the onus of proving estoppel or shewing cause why the discretion of the court should be exercised in his favour was on the defendant, I called upon him to prove his case.

At the commencement of the hearing an agreed bundle of documents relating to the case was tendered in evidence by consent. It was admitted and marked "A". Document A1 is a copy of the sub-lease in question. Clause 8(iii) of A1 provides for the cancellation of the sub-lease at the discretion of the Senior Inspector of Mines or the court if the sub-lessee failed to employ during a period of six months at least 59

labourers or labour saving apparatus equivalent thereto as required by the provisions of section 16(iii)(c) of the Mining Enactment. Clause 11 entitles the sub-lessee or a sub-sub-lessee to dump upon the worked-out portions of the land in question, tailings of the adjoining lands without paying any charges. Clause 11 further provides that the sub-lessee shall notify the sub-lessor whenever such dumping is made.

The facts of the case are briefly as follows:—

On the 13th of January 1961 the plaintiff sub-leased lot 42979 to the defendant on the terms and conditions mentioned in A1. On the same day the defendant sub-sub-leased the said land to one Wong Fook Choon (D.W.3) on the terms and conditions as set out in A7. (See bundle "A"). Then again on the same day the said Wong Fook Choon became the sub-sub-lessee of an adjoining piece of mining land comprised in lot 40993. Later Wong Fook Choon transferred this sub-sub-lease to one Leong Fong Yuan and his son Leong Kee Seong.

From about June 1961 up to about the 8th of August 1962, Wong Fook Choon carried on mining operations on lot 42979 under the name of Kwong San Loon Kongsi. During this period the production of tin ore from the said land averaged 49 piculs per month. It would appear that the mine was closed down not because the venture was a failure but because the profit was negligible owing to the low price of tin ore which fetched then about $360 per picul as against a figure of about $750 at the present time.

It will be seen from the plan in A31 that the southern boundary of lot 42979 abuts the northern boundary of lot 40993. It was alleged by Wong Fook Choon in the course of his evidence that owing to restricted dumping facilities on lot 42979 he dumped the tailings partly on lot 42979 itself and partly on lot 40993, and that for the use of lot 40993 he paid Leong Fong Yuan the sub-sub-lessee thereof a tribute of 1% from the ore won from the plaintiff's land

When Wong Fook Choon transferred his sub-sub-lease over lot 40993 to Leong Fong Yuan and Leong Kee Seong on 17th June 1963, he also assigned to them on the same date his sub-sub-lease over lot 42979. Then on the 1st of March 1964 Leong Fong Yuan and Leong Kee Seong issued to Leong Kee Seong (himself) and to one Ho Hong Lan, both of the Sin Kah Hing Mining Kongsi, a permit (D.13) to mine lot 40993 and another permit (P.5) to mine about 4½ acres of lot 42979. The situation therefore on the 1st of March 1964 in respect of the sub-lease over lot 42979 was that the land had not been mined since August 1962.

On the 3rd of March 1964 the permit holders applied in the name of Sin Kah Hing Mining Kongsi to the Mines Department to approve a mining scheme in respect of lot 40993 and 42979 as shewn in A15. This scheme was approved on the 10th of April.

On the 14th of March 1964 the plaintiff filed the complaint in this case. According to the certified copy of the notes (P.9) recorded by the Senior Inspector of Mines when the case first came up for hearing on the 11th of April defendant's counsel successfully applied for a postponement despite objections by counsel for the plaintiff on the ground that the postponement was asked for in order to gain time to build up a case against the plaintiff to the effect that his attorney had consented to a mining scheme put forward by the permit holders in respect of lot 42979 contained in a plan dated the 16th of March 1964 and left in the office of the attorney about 3 days before the 11th of April.

In the meantime the defendant had on the 6th of April despatched a telegram (A16) to the plaintiff in India appealing to him to instruct his attorney to withdraw the case and assuring him that his tribute would be paid in full.

This telegram was followed by a letter (A18) dated 7th April giving a detailed account of the various transactions that had taken place in respect of the sub-lease and the reasons for the failure to resume mining operations. He further informed plaintiff of the new mining venture by the present permit holders who had expended over $100,000 and again appealed for a withdrawal of the case.

On 18th April the plaintiff's solicitor despatched a letter (A20) to the defendant's solicitors Messrs. Maxwell, Kenion, Cowdy & Jones calling their attention to what he had said in court on 11th April and informing them that the person who left a plan dated 16th March 1964 in the plaintiff's attorney's office and walked away was one Leong Fong Yuan and that his client should not be taken to have in any way consented to the mining scheme disclosed in the plan.

The reply (A22) is dated the 21st of April. It was alleged in A22 that Leong Fong Yuan had gone to the attorney's office on the 20th of March on behalf of the defendant and not two or three days prior to the 11th of April as alleged in A20 and that the approval plan of the mining scheme was not forced upon the plaintiff's attorney but was handed to him after the scheme was explained; whereupon the attorney had expressed his satisfaction with the scheme and requested to be taken to the mine. Accordingly he was taken the next day to the mine by the permit holders, Leong Kee Seong and Ho Hong Lan and after seeing the work in progress he consented to the implementation of the scheme.

The facts alleged by the defendant in the

statement of defence in support of his plea of estoppel may be summarised as follows:

(A) The plaintiff by consenting to various transactions whereby the authority to mine under the sub-lease passed from the defendant to the present permit holders had led the defendant to believe that he would not take action for breach of clause 8(iii) of the sub-lease; and

(B) The plaintiff by authorising Leong Fong Yuan, who had gone to see him on behalf of the defendant on a certain day in March 1964, to implement the approved mining scheme, and by accepting a plan of the scheme from Leong Fong Yuan, by visiting the mine on the following day to see the works in progress and also by his previous conduct had represented to the defendant, the sub-sub-lessees and the permit holders that he would not take action under clause 8(iii) of the sub-lease and is therefore estopped from proceeding under clause 8(iii) of the sub-lease.

I must mention that Muthiah Chettiar, the plaintiff in this action was away in India during the period 26th April 1962 to the 7th of April 1963 and again from 19th September 1963 to the 29th of June 1964.

Now with regard to the allegation mentioned in (A) above, it is admitted that the plaintiff was aware of the sub-sub-lease to Wong Fook Choon. The transfer of the sub-sub-lease to Leong Fong Yuan and Leong Kee Seong was registered on the 17th of June 1963 when the plaintiff was in this country. According to the evidence of the plaintiff, he and the defendant were on visiting terms and he had often asked the defendant why Wong Fook Choon was not working his land to which defendant would reply that he would speak about it to Wong Fook Choon. The plaintiff in his evidence did not deny knowledge of the transfer of the sub-sub-lease to Leong Fong Yuan and Leong Kee Seong in 1963. What he denied was that Wong Fook Choon or the defendant told him about the transfer. It is most unlikely that a chettiar who had not received tribute since September 1962 would have made no attempt to find out the truth regarding future mining operations on his land. I do not accept the plaintiff's evidence that in 1963 he was unaware of the transfer of the sub-sub-lease to Leong Fong Yuan and Leong Kee Seong. I do not also accept the evidence of Kasivisvanathan (P.W.2) that up to the time of filing the complaint on the 14th March, 1964 he was not aware of the transfer of the sub-sub-lease. To hold otherwise would be to cast a slur on the intelligence and business acumen of the chettiar community. However, knowledge does not imply knowledge or consent before the event and I must hold that in this case there is no evidence that the transfer was done with the prior knowledge and consent of the plaintiff. On the other hand, there is no reason to disbelieve the defendant's evidence that the plaintiff was happy to hear of the transfer for it would have renewed his hope of getting his tribute.

No evidence was called to prove that the plaintiff or his attorney knew before this action was commenced about the issue of the permit to mine to Leong Kee Seong and Ho Hong Lan on the 1st of March 1964. On the contrary the evidence is that in the latter part of 1963 or early 1964 the defendant informed the attorney that it was the sub-sub-lessees who were going to work the land and explained the proposed scheme to him. This is what the defendant said in evidence:

"Leong Fong Yuan and Leong Kee Seong under the name of Sin Kah Hing Kongsi made preparations to work. They applied for a mining scheme, for electrical power, installed a jig. They got all these implements and machinery from their former mine at Chenderiang. These mining equipment were transferred about the end of 1963 or early 1964. At that time Muthiah Chettiar was in India. I got in touch with the plaintiff's attorney Kasivisvanathan who is in court. I informed him that the mining equipment will be transferred to lot 42979 or to lot 40993. Before that the attorney had complained of my failure to work his principal's land. When I told him of the proposed transfer of the mining equipment to lot 42979 or lot 40993, he further complained that the equipment was for working the adjoining land and not his principal's land. I explained that the other land will be worked first and then will go on into his principal's land. He was not satisfied with the arrangement. I explained to the attorney that there was already a mine hole on the adjacent piece of land and it would be far easier to start working from there. The attorney was grumbling that he would not get any income."

Then again under cross-examination he said:

"It is true that during the end of 1963 and early 1964 plaintiff's attorney was pestering me for not working the land. He was dissatisfied. I told him that the matter was not in my hands but in the hands of Leong Fong Yuan and Leong Kee Seong and requested him to write to me so that I could take up the matter. Before I asked him to write to me I did take up the complaint with Leong Fong Yuan and Leong Kee Seong. They were making preparations. I did not tell plaintiff's attorney that he could get the sub-lease cancelled."

I accept the evidence of the defendant that sometime in the early part of 1964 the plaintiff's attorney, Kasivisvanathan, was taken by him to the site of the proposed mine, shewn the equipment which had been installed and explained the proposed mining scheme. However, the sum total of the defendant's evidence amounts to (1) an admission that the implementation of the proposed mining scheme was started before it was approved by the Mines Department, (2) that the proposed scheme was explained to the plaintiff's attorney only after the machinery had been installed, (3) that there was no intention on the part of the defendant, his sub-sub-lessees and permit holders to start work on the plaintiff's land immediately, and (4) that the plaintiff's attorney did not approve of such a scheme.

All these circumstances point to the reason why the plaintiff who had not thought fit to assert his right to cancel the sub-lease since September 1962 should have suddenly decided to institute the present action. They also explain the reason why the defendant thought it necessary to call further evidence to prove that even subsequent to the approval of the scheme by the Mines Department the plaintiff's attorney had consented to its implementation by the permit holders. This brings me to the consideration of the allegations mentioned in (B) above.

The facts about the alleged consent to the implementation of the new mining scheme are given in the defendant's solicitors' letter of 21st April (A22). According to the letter Leong Fong Yuan called on the plaintiff's attorney on the 20th of March 1964 with a plan of the mining scheme recently approved by the Mines Department and explained it to him. The attorney was then said to have expressed satisfaction with the scheme and to have accepted a copy of the plan. Then at his own request the attorney was taken to the mine on 21st March by the present permit holders, and shewn the preliminary work in progress and again explained the reason for non-commencement of work immediately on the plaintiff's land to which arrangement the plaintiff was said to have acquiesced at all times.

On the 25th of April the statement of defence was filed. There is one significant change in it from what was alleged in the letter. The date of the interview by Leong Fong Yuan is not given except to say that it took place sometime in the month of March 1964. It was perhaps thought necessary to introduce this change because it was realised after A22 had been written that the plaintiff had already commenced this action on the 14th of March.

Now Kasivisvanathan (P.W.2), the plaintiff's attorney, denied the allegation that Leong Fong Yuan called on him on the 20th of March or that he discussed the mining scheme with him. According to him, Leong Fong Yuan came to his office together with the defendant when the latter called about 4 or 5 days before the 11th of April to get the address of the plaintiff in India. He further said that just before they left Leong Fong Yuan placed the plan of the mining scheme dated 16th March 1964 on his table and walked away without any comment.

The defendant admitted in cross-examination that he called on the plaintiff's attorney about 3 or 4 days before the 11th of April but went there alone and could not remember whether he left a plan with the attorney or not. Earlier he had said in evidence that he had been told by Leong Fong Yuan and Leong Kee Seong that a plan of the scheme had been given to the attorney.

According to the evidence of Leong Kee Seong (D.W.4), he had gone to the attorney's office on a date which he could not now recall accompanied by Leong Fong Yuan, Ho Hong Lan (D.W.6), and a person named Wu, and having explained the mining scheme gave a copy of the plan to the attorney. But according to this version the attorney did not express any opinion as to whether he approved the scheme or not but merely asked that he be shewn the mine. Accordingly he was taken the next day to the mine by himself (Leong Kee Seong) and Ho Hong Lan but again the attorney did not say whether he agreed to the implementation of the mining scheme or not. From his conduct it was assumed that he consented to the scheme.

Ho Hong Lan's (D.W.6) evidence was to the effect that the purpose of the visit to the attorney was to inform him as the landowner that work on the mine would commence soon and to get acquainted with him. He did not understand the conversation between the attorney and the other 3 persons who accompanied him as he could not speak Malay. As far as he was aware neither on that day nor on the next day when the attorney visited the mine did the attorney say anything about the implementation of the scheme. In cross-examination, he further said that his party did not go to see the attorney on behalf of the defendant and that it was more of a social than a business visit.

In the first place, there are inherent defects in the story itself. In the defendant's solicitors' letter (A22) of the 21st of April and in paragraph 4 of the statement of defence Leong Fong Yuan is said to have handed to the plaintiff's attorney in the month of March a copy of the mining scheme which had been recently approved. According to the evidence of the Inspector of Mines (D.W.1) the scheme was not approved until the 10th of April. Further, surprise is expressed in A22 by the defendant's solicitors at the plaintiff's attorney taking this action after agreeing to the implementation of the mining scheme on the 20th of March. But the complaint in these proceedings was filed on the 14th of March and the real surprise is that the defendant's solicitors were surprised at all. It is indeed significant that when giving evidence in court, neither the defendant nor Leong Kee Seong nor Ho Hong Lan could remember the date of the interview with the plaintiff's attorney, although it was admitted by Leong Kee Seong that he was present with his father Leong Fong Yuan when the latter instructed Messrs. Maxwell, Kenion, Cowdy & Jones to write A22 mentioning the date of the interview as the 20th of March. Later when confronted with these facts Leong Kee Seong said that the interview took place in February 1964.

Secondly, there is no mention whatever either in the said letter or the statement of

defence that Leong Fong Yuan was accompanied by anybody. The story told in court was that four persons went in all. Then again, according to A22, Leong Fong Yuan called on the plaintiff's attorney on behalf of the defendant whereas the permit holders said in evidence that the party went on behalf of themselves.

Thirdly, the evidence given in court as to what transpired during the interview with the plaintiff's attorney differ from what is alleged in the letter and in the statement of defence. In the letter the attorney is said to have consented to the implementation of the mining scheme. In the statement of defence he is said to have caused the miner to implement the mining scheme by making representation that he would not take action under clause 8(iii) of the sub-lease. According to the evidence given in court, the attorney did not say anything at all during the alleged interview or visit to the mine regarding the implementation of the scheme.

Fourthly, in the telegram and letter sent by defendant to the plaintiff there is no mention whatever of either plaintiff or his attorney going back on their word after agreeing to the implementation of the scheme. On the contrary, defendant appeals to the plaintiff to withdraw the case in the name of friendship and the need for reconciliation.

Fifthly, neither Leong Fong Yuan nor Wu, was called as a witness by the defendant. I must therefore draw the inference under section 114(g) of the Evidence Ordinance that had they been called their evidence would have been unfavourable to the defence.

I have therefore formed the opinion on the evidence as a whole that the alleged visit by Leong Fong Yuan to the plaintiff's attorney in March 1964 and the alleged consent by the attorney to the implementation of the new scheme and the alleged visit by the attorney to the mine accompanied by the permit holders are pure fabrication.

There is nothing in the evidence to shew that the doctrine of estoppel applied to the facts of this case. The plaintiff sub-leased his land to the defendant on the 13th of January 1961 and on the same day the defendant sub-sub-leased it to Wong Fook Choon. After working the land for some time Wong Fook Choon ceased mining operations in August 1962. The legal position then was that in or after September 1962 the plaintiff was entitled to take action under clause 8(iii) of the sub-lease to have it cancelled. Because he abstained from doing so and did not object to Wong Fook Choon transferring his sub-sub-lease to Leong Fong Yuan and Leong Kee Seong on the 17th of June 1963, the plaintiff is alleged to have represented to the defendant that he would not take action to cancel the sub-lease.

Now, if during the 12 months from September 1962 the plaintiff did not take action to cancel the sub-lease, the principal lease was not in jeopardy of cancellation by virtue of the period of grace allowed under section 16(iii)(c) of the Mining Enactment. But long before the expiry of that period Wong Fook Choon transferred the sub-sub-lease to the present sub-sub-lessees and, according to the defendant, the plaintiff was happy to hear of it. This is certainly not evidence of a representation by plaintiff that he would not take action to cancel the sub-lease but of a representation made to the plaintiff to the effect that mining operations would be resumed shortly. If in those circumstances anyone was induced to alter his position to his detriment it was the plaintiff who was induced not to take action under clause 8(iii) of the sub-lease and thereby lose the opportunity of getting someone else to work his land within a reasonable time.

The subsequent conduct of the plaintiff shew that in or about September 1963 when the one year period of grace under section 16(iii)(c) of the Mining Enactment was about to expire, his attorney started to pester the defendant to take steps to work the land and according to the defendant the pestering continued into the early part of 1964. To suggest, therefore, that from September 1962 to the early part of 1964 the plaintiff represented to the defendant or to anyone else that he would refrain from taking action under clause 8(iii) of the sub-lease, is to say the least, absurd.

It was also alleged that the plaintiff's attorney had sometime in March 1964 made the same representation to Leong Kee Seong and Ho Hong Lan who were granted a permit to mine the plaintiff's land by the sub-sub-lessees on the 1st of March 1964 and had induced them to implement the new mining scheme. I have already held that the alleged interview of the plaintiff's attorney by the permit holders and the sub-sub-lessees in March 1964 did not take place.

Again in law one of the constituent elements of estoppel is that the representation should be made with the intention of inducing the person pleading estoppel to alter his position to his detriment. (See *Monir* on Principles and Digest of the Law of Evidence (4th Edition) Vol. 2 at page 713). Even if the plaintiff had made the representation complained of there is not a scrap of evidence to shew in what way the defendant was induced to alter his position to his detriment. If, on the other hand, the suggestion is that as a result of the representation made to the defendant, it was the permit holders who had been led up the garden path to throw away $100,000 into the mining venture, I fail to see how a plea of estoppel which might have been available to the permit holders had they been

sued, could be availed of by the defendant.

In my opinion, therefore, the plea of estoppel, in this case, must fail.

I shall now consider the question whether this is a proper case in which I should exercise my discretion in favour of the defendant and refuse an order for the cancellation of sub-lease No. 8/61.

The plea of estoppel by the defendant implied a tacit admission that clause 8(iii) of the sub-lease had been breached; and yet counsel for the defendant submitted that the requirements of clause 8(iii) had been complied with by the installation of a 60 h.p. tailings pump on plaintiff's lot 42979 as evidenced by the plan A27.

Counsel then went on to submit that in exercising its discretion the court should determine whether the defendant had an adequate explanation to offer for the 1½ years delay since August 1962 in resuming mining operations on the plaintiff's land by taking into consideration the following factors, namely:—

(1) The difficulty of complying with the stringent provisions of the Mining Enactment;

(2) The fact that lot 42979 could not be worked profitably;

(3) The fact that the plaintiff's land cannot be worked as a single unit;

(4) The fact that the plaintiff realised these difficulties by not asserting his rights under clause 8(iii) of the sub-lease for 1½ years; and the reason for his present action being not that his land could be worked independently of lot 40993 but because his land is not being worked first; and

(5) The fact that although lots 40993 and 42979 cannot be worked independently, they could be worked jointly which is a special reason why in the interest of all parties concerned the sub-lease should not be cancelled.

With regard to the submission that clause 8(iii) of the sub-lease had been complied with by the installation of a 60 h.p. tailing pump on lot 42979 as evidenced by the plan in A27, no evidence was called to shew when the pump was installed. But even if the pump was installed before the cause of action in this case arose, it is manifestly clear that the purpose of the installation was not to work lot 42979 but to dump tailings on it from lot 40993. It is true that the mining scheme in question provided for working 4½ acres in lot 42979 but working 4½ acres only out of the 59 acres comprised in lot 42979 is not, in my opinion, a genuine attempt to implement the provisions of the sub-lease and it violated the letter and spirit of section 16(iii)(b) of the Mining Enactment. And besides, the defendant having pleaded estoppel must abide by its implication that clause 8(iii) of the sub-lease had been breached.

The first factor I have been asked to take into consideration in exercising my discretion against cancelling the sub-lease is the alleged stringency of the Mining Enactment; but no evidence was called to shew that the failure to resume mining operations for 1½ years was occasioned by the stringency of the law. It may be true that the stringent provisions of the Mining Enactment may be a factor in delaying the approval of a mining scheme but the failure to submit a scheme for approval to the Mines Department for a period of 1½ years cannot be said to be due to the stringency of the law.

Again, if the allegation that lot 42979 cannot be worked profitably is true, it would afford the soundest reason possible for cancelling and not prolonging the sub-lease.

Evidence was called to shew that the plaintiff's land could not be worked as a single unit owing to inadequacy of dumping area and sources of water supply within the land itself. This fact was confirmed by the Inspector of Mines (D.W.1), who further said that the mining scheme issued to Wong Fook Choon (D.W.3) to work lot 42979 in 1961 provided for the use of a part of lot 42979 and a part of lot 40993 as a dump for tailings from the plaintiff's land. Wong Fook Choon deposed that for dumping on lot 40993 he paid a tribute at the rate of 1% of the ore won from the plaintiff's land to Leong Fong Yuan, the owner thereof. This story appears to me highly suspect since during the whole of the period that Wong Fook Choon operated the mine on lot 42979, he himself was the sub-sub-lessee of lot 40993. The transfer of the sub-sub-lease over lot 40993 from Wong Fook Choon to Leong Fong Yuan did not take place till the 17th of June 1963. Besides, Leong Fong Yuan was not called as a witness. I believe the alleged payment of tribute was introduced to convince the court, but without success I fear, how desperate was the need for a dump outside lot 42979 and to what expense Wong Fook Choon was put to in order to acquire that facility. Inadequacy of dumping facility and sources of water supply are problems which should have been considered before the land was taken on a sub-lease and if because of this defect it is discovered later that the land cannot be worked as a single unit it would also afford the best reason conceivable why the court should exercise its discretion in favour of cancelling the sub-lease.

It was argued that because the plaintiff was aware all along that lot 42979 could not be worked as a single unit, he had condoned the breach of clause 8(iii) of the sub-lease and that his motive for now bringing the present action was because his land was not being worked first.

The mining scheme which is now being implemented provides for the mining of the whole of the land comprised in lot 40993 and 4½ acres only out of 59 acres in lot 42979. It would therefore appear that the scheme does not provide for the full and proper implementation of the terms and conditions mentioned in the sub-lease.

However, I have the gravest doubt whether the permit holders in submitting the mining scheme in the present form ever intended to mine the 4½ acres in lot 42979 under that scheme. I believe that the 4½ acres were included in the scheme as a cover to make use of the dump and the water from the mine hole in lot 42979 and also as a sop to Cerberus in the person of a grumbling chettiar.

I am fortified in this belief by the following facts. The reason given in evidence by the permit holders for now deciding not to work the 4½ acres of lot 42979 was that when the mining operations approached the boundary of lot 40993 with lot 42979 it was discovered that the 4½ acres was covered by a top layer of slime to a depth of about 14 to 16 feet. It is difficult to believe that these two experienced miners of many years standing and who claimed to have thoroughly prospected the land would have been unaware that the very small area they selected in lot 42979 for mining could not be mined.

It may be recalled that the defendant said in evidence that when in the early part of 1964 he informed the plaintiff's attorney that the sub-sub-lessees intended to mine lot 40993 before proceeding to mine lot 42979, the attorney was not satisfied and went away grumbling. At that time there was no inkling of a suggestion of mining even only 4½ acres in lot 42979. The suggestion then was that the plaintiff's land will not be mined until after lot 40993 had been mined. Subsequently the sub-sub-lessees issued the permit to mine to the present permit holders of whom one is still a sub-sub-lessee. I believe that the permit holders knowing well that a good excuse existed for not mining the 4½ acres decided to include that area in the new mining scheme in the hope of appeasing the plaintiff and to assert their right to dump tailings on lot 42979.

Again the Inspector of Mines said in evidence that when slime was encountered near the boundary of lots 42979 and 40993, he instructed the mining kongsi to remove the slime and continue with the operations but the kongsi decided not to mine the 4½ acres. On this point, Leong Kee Seong one of the permit holders went to the extent of contradicting the evidence of the Inspector of Mines by saying in the course of his cross-examination that "the Inspector of Mines did not direct us to remove the slime and continue with the operations". All this evidence, in my opinion, point to the fact that the permit holders never intended to mine the 4½ acres under that mining scheme.

The argument that the sub-lease should not be cancelled since the present arrangement enabled the permit holders to work lots 40993 and 42979 together as a single unit thus affording sufficient space for dumping the tailings from one lot to the other as the mining progressed is an attractive one provided that the financial benefit derived from such an arrangement is evenly distributed among the parties concerned. According to the evidence of Leong Kee Seong it would take from 2 to 4 years to finish the mining operations in lot 40993 and only after that his kongsi would work lot 42979. Quite apart from the fact that the postponement of mining operations on lot 42979 for 2 to 4 years would render the mining lease liable for cancellation under section 16(iii)(c) of the Mining Enactment, the decision would also condemn the plaintiff to a waiting period of two to four years before he could receive the tribute payable under the sub-lease. The defendant said under cross-examination that at the price of tin prevailing in 1961 he did not think that a mine could have been worked economically on lot 42979 but that at the present price, a mine could be worked profitably. There is no guarantee, therefore, that when in the ripeness of time the plaintiff becomes eligible to receive his tribute that the price of tin would be attractive enough to work a mine on his land. In the meantime, the lessee, the sub-lessee, the sub-sub-lessees and the permit holders of lot 40993 would continue to enjoy at the expense of the plaintiff all the advantages of working lots 40993 and 42979 as a single unit.

If I should make an order which would allow the permit holders to carry on as they had planned to mine these lands, it would be tantamount to exercising my discretion to deprive a lawful owner of property the right to use it to his best advantage.

Whether the plaintiff is able to find a suitable dumping area or not is his concern but an Inspector of Mines had wide powers under section 82 of the Mining Enactment to direct any occupier of mining land to deposit his tailings on State land or mining land. As for sources of water supply to work a mine it is again a matter for negotiation and arrangement with owners of adjoining lands.

I therefore hold that the defendant has failed to shew cause why sub-lease No. 8 of 1961 over mining lease No. 14299, for lot 42979 Mukim of Kinta should not be cancelled for breach of clause 8(iii). I therefore order the cancellation of the said sub-lease and award the costs of this action to the plaintiff.

Cancellation ordered.

Solicitors: *N. Sharma; Chin Swee Onn.*